SUPREME COURT, U. S. No. 163

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC.,

and

DRUG AND TOILET PREPARATION TRAFFIC CONFERENCE,

Appellants,

v.

RINGSBY TRUCK LINES, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

APPELLANTS' RESPONSE TO THE SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

ARTHUR A. ARSHAM,
233 Broadway,
New York, N. Y. 10007.
JOHN J. C. MARTIN,
685 Third Avenue,
New York, N. Y. 10017,
Attorneys for Appellants.

EDWIN L. SPANGLER, JR.
MAX L. WYMORE,
1700 Broadway,
Denver, Colorado 80203.

TILLY & GRAVES,
830 Capitol Life Center
Denver, Colorado 80203,
Of Counsel.

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In their memorandum filed July 1967, the United States and Interstate Commerce Commission (US-ICC) suggested that the district court's judgment, enjoining the Commission's order, might be summarily affirmed as the first question raised on this appeal is insubstantial; and the second, moot. The first question relates to the restraint on the Commission's order imposed and kept in force in contravention of statutory mandate. The second involves the district court's judgment on the merits and the effect of the Commission's response to the court's remand, on the right of a party aggrieved to appeal. In that memo-

randum, US-ICC acknowledged that irreparable injury would *not* result to the carriers if the Commission's order directing cancellation of rate increase tariffs were permitted to become effective pending judicial review. In this, they stated, they disagreed with the district court. They then said:

> "This question is not moot, because it would affect appellants' claims for restitution of charges paid under the increased rates; but in our view it does not warrant plenary review by this Court."

As $2,370,627 in excess charges was collected by the appellee-carriers during the period the Commission's order lay under the district court's restraint, the effect of an erroneous decision on the public can scarcely be termed insubstantial, or its correctness a matter lightly to be dismissed as not warranting plenary review. Called on by the Court (by order of October 23, 1967) to elaborate their position, US-ICC in a supplemental memorandum (filed December 1967) sought to disengage themselves from a palpably contradictory stand. Appellants suggest, they have only succeeded in confirming that the issues raised on this appeal are viable and merit plenary review by this Court.

The theory put forth by US-ICC that appellants' restitutional remedy would not suffer impairment by dismissal of the appeal, dissolves in the presence of *Atlantic Coast Line v. Florida* (295 U. S. 301). Should this appeal be dismissed, the doctrine of that case would bar appellants from recovering restitution for excess charges collected by the appellee-carriers while the Commission's first order lay under the district court's restraint. It is the district court's restraint of that *first order* that is challenged by this appeal. If the district court's action cannot be shown on appeal to have been erroneous, equity will not subject the appellee-carriers to restitution for failing to comply

with a Commission order adjudged faulty by the district court.

As to the notion that the district court's judgment, sought to be reviewed on the merits, is a species of interim remand "for clarification", and thus not appealable, US-ICC themselves put that theory to rout by their reiterated characterization of the district court's judgment as a "reversal" of the Commission's order, which they describe as placed under "a permanent injunction". In a recent case, *Louisville & N. R. R.* v. *United States*, 268 F. Supp. 71, the district court (W. D. Ky.) set aside the Commission's order on grounds and in terms strikingly similar to those employed by the district court below in calling for clarifying explanation and reasons for what the Commission had done. There, as here, the court declared that it was unable to determine the reasons for the Commission's holding. Far from questioning whether that decision is reviewable, ICC filed notice of appeal to this Court. On November 9, 1967, it filed its jurisdictional statement and on December 13, 1967, the Solicitor General submitted a memorandum suggesting that the case warrants plenary consideration by this Court. (Case No. 809, October 1967 Term, *Interstate Commerce Commission* v. *United States.*)

In the supplemental memorandum, US-ICC sound a retreat from the position they assumed originally that the issue with respect to continuation of the unwarranted restraint of the Commission's order is *not* moot. They now assert this issue is moot, or to use their words, "substantially moot".* This is footed on the belief that resti-

* Supp. Mem., p. 2: "Upon reconsideration, we are satisfied that both questions are substantially moot." This imparts to the concept of mootness, curiously elastic properties. Whether an issue is moot would appear to involve its state rather than a condition susceptible of admeasurement in degree of substantiality.

tution would survive though the appeal were to be dismissed. In those circumstances, US-ICC suggest, "it would be appropriate to treat the present appeal as moot." The corollary that US-ICC must surely be prepared to accept is that, if a restitutional remedy is lost to appellants by dismissal of the appeal, it would be singularly inappropriate to treat the present appeal as moot.

1. The Restitution Question

The Commission's *first order* directed cancellation of the increase tariffs by September 12, 1966. It was placed under the first district court's restraint on September 9, 1966; that restraint was kept in force, without ruling on the application for interlocutory injunction, until January 5, 1967, when the district court handed down its decision on the merits enjoining the Commission's order. The Commission's *second order* was issued February 1, 1967; it required the increase tariffs to be cancelled by March 10, 1967, but simultaneously stipulated that, if the carriers brought review proceedings in any court, that order would not become effective, but would be automatically postponed pending review. There are thus two distinct periods to be considered in relation to restitutional remedies: (1) September 9, 1966 to January 5, 1967, based on the Commission's first order and the first district court's restraint; (2) March 10, 1967 to final judgment, relating to the Commission's second order and the second district court's review.

It has not been disputed that appellants are entitled to restitution if the district court erred (a) in continuing in force to the date of its judgment on the merits, a restraint on the Commission's order where no prospect of irreparable injury existed; (b) in setting aside the Commission's order as inadequately supported, where its findings

and reasons were sufficient under recognized standards of review. US-ICC maintains that restitution is recoverable if the Commission's order is "ultimately" sustained. To prevail in their contention that the appeal is therefore rendered moot, they must also establish that restitution will be granted even if the district court's judgment restraining the Commission's first order is never reviewed on appeal; never adjudged to have been erroneous. *Atlantic Coast Line* v. *Florida, supra,* cannot be strained to accommodate such a result. Indeed, its holding would preclude it.

The doctrine of *Atlantic Coast Line* v. *Florida* is that restitution is not an unqualified legal right but an equitable remedy. The remedy in equity is hemmed with conditions that in *Atlantic Coast Line* operated to deny restitution. The same result would follow where, as here, the rate increases were collected because the Commission's order directing their cancellation was restrained and then enjoined by the district court in a judgment that, though challenged on appeal, was not reviewed and never reversed. In *Atlantic Coast Line,* this Court described how the federal court approaches a suit for restitution where a Commission decision ordering rate increases had been set aside as not supported by requisite findings (295 U. S. 301 at 315):

> "It [the federal court] inquires whether anything has happened whereby a court of equity would be moved to impose equitable conditions upon equitable relief. In the course of that inquiry it perceives that the charges were collected under color of legal right, in circumstances relieving the carrier of any stigma of extortion."

In those circumstances, the court leaves the parties where it finds them. Restitution will be denied. Absent an adju-

dication that the district court had erred, the court's judgment restraining the Commission's order would stand to impart color of right to the carriers' collection of the increases. No "stigma of extortion" attaches to the collection of increases where the Commission's order requiring their cancellation had been adjudged improper and the judgment stood unreversed. As Mr. Justice Cardozo stated (at p. 314):

> "This District Court whose decree we are reviewing was organized to pass upon the question whether the challenged order of the Commission should be vacated or upheld. 28 U. S. C. §47. Whatever power it has to compel restitution by the carrier of items subsequently collected derives from that primary jurisdiction and is ancillary thereto."

In arguing that ultimate vindication of the Commission's order will permit restitution, US-ICC overlook the disparate forums that are here involved. They say (Supp. Mem., p. 3):

> "Higher rates paid under a court order staying the effectiveness of a Commission rate determination pending review proceedings are subject to restitution if the Commission's order is ultimately sustained."

With this statement of general rule one can scarcely find fault. The difficulty is with the use made of it by US-ICC. "If the Commission's order is ultimately sustained" does not describe this case. What we have here are two Commission orders. The first order (issued to take effect on September 12, 1966) would not be ultimately sustained. It was enjoined and set aside as improper in a judgment never

to be reviewed and reversed, if US-ICC's contentions prevail. On February 1, 1967, the Commission issued a second order. If that order is sustained as proper, it could not, under the doctrine of *Atlantic Coast Line,* give rise to restitution under the first order. As the court puts it in *Atlantic Coast Line* (p. 309):

> ". . . what has been lost to a litigant under the compulsion of a judgment shall be restored thereafter in the event of a reversal, [i.e.; of that judgment] . . ."

Sustaining the Commission's second order in the second action before the district court cannot be deemed "a reversal" of the district court's judgment in the first action setting aside the Commission's first order. If a maximum rate level were prescribed in the second order, it might provide the basis for a reparation complaint. However, as US-ICC themselves observed (Supp. Mem., p. 3), restitution is distinct from reparation, a statutory remedy described in *T.I.M.E., Inc.* v. *United States,* 359 U. S. 464, and in no wise involved here.

A residual point remains to be considered. Regardless of the disposition ultimately made of the substantive merits of the Commission's order directing cancellation of the increase tariffs, appellants have levelled a challenge at the propriety of the court's action in continuing in force the restraint of the Commission's order although no irreparable injury threatened the carriers. Monies have been exacted from the appellants by reason of this restraint for which a claim to restitution would arise were the restraint held to be improper on appeal. This is undoubtedly what US-ICC meant when they said (Mem., pp. 3-4) that they disagree with the Court's finding that irreparable injury would result to the appellee-carriers if the Commission's order were not restrained and added: "This question is not

moot, because it would affect appellants' claims for restitution of charges paid under the increased rates." Nothing US-ICC has said in its supplemental memorandum effectively negates that view. Appellants are entitled to seek review of the district court's order improperly granting a restraint. If this appeal is dismissed, nothing that can later happen by way of sustaining a Commission order to cancel the increase tariffs will permit appellants' restitutional remedies for improper restraint of the Commission's first order to survive. *Atlantic Coast Line* confirms that, no matter what happens to the Commission's second order, restitution for restraint of the Commission's first order involving excess charges collected in the period from September 9, 1966, to January 5, 1967, will be irretrievably lost if the district court's judgment setting aside the first order may not be reviewed.

2. Nature and Effect of District Court's Judgment

In the supplemental memorandum (p. 3), US-ICC impart to the district court's judgment the aspect of an interim remand with the implication that it is hardly worthy of review. This does scant justice to the gravity of issues evoked by the district court's action and its impact on the public in motor carrier revenue cases (JS 17-19). Nor can this be reconciled with what the government parties previously said in this case or what they did in comparable situations in other cases.

The government parties have characterized the district court's judgment, not as an inconclusive remand, but as a "reversal". Thus, the Commission said (JS, App. C, p. 421): "The United States District Court . . . in an opinion of January 5, 1967, *reversed* and remanded the proceed-

ing." In their first memorandum to this Court (p. 1), US-ICC again characterized the district court's action as "reversing" the Commission's order. It then described the action of the lower court thus (p. 2): "The statutory three-judge district court continued the restraining order on November 4, 1966, and, after a hearing, entered a *permanent injunction.*" (emphasis added.)

In *Louisville & N. R.R.* v. *United States,* 268 F. Supp. 71, the district court (W. D. Ky.) set aside the Commission's order on grounds and in terms similar to those employed by the district court here in calling for a clarifying explanation and reasons for what the Commission had done. In *Louisville,* the court declared, as here, that it was unable to determine the reasons for the Commission's holding and called for answers to a series of questions on which it said the Commission's report left it "completely in the dark". To the judgment setting aside that order and remanding that matter to the Commission, the Interstate Commerce Commission responded—not with a new report and a challenge to reviewability by other parties—but with a notice of appeal to this Court. Its jurisdictional statement was filed in *Interstate Commerce Commission* v. *United States* on November 9, 1967. On December 13, 1967, the Solicitor General submitted a memorandum suggesting that the case warrants plenary consideration by this Court.

The contention put forth by US-ICC that the district court's judgment of remand "for clarification" and the Commission's response thereto, render the appeal of other aggrieved parties moot would, if adopted, make the reviewing process something of an interior dialogue between district court and Commission at the expense of the rights and remedies of other parties. Nor may it fairly be urged that appellants' right to appeal should be dependent on

whether the Commission elects to respond to the district court's judgment of remand, by writing a new order. By this appeal, the shipper leagues who are the appellants seek to bring to this Court for definitive adjudication, issues evoked by the district court's action that probe the fundamental relation between administrative agency and reviewing court as they interact in motor carrier increase proceedings, with special reference to standards of proof and the power of the agency to formulate and apply them. Centrally involved is the question of unwarranted restraints placed on Commission orders and the motivation thereby provided for motor carriers to invoke the processes of judicial review for no other, and no better, purpose than to continue to collect for a little while longer, rate increases ordered cancelled by the Commission. These issues inhere in the action taken by the district court with respect to the Commission's original order. Such issues survive anything the court may do in the second case brought before it. If for no other reason than to introduce needed clarity and precision in the developing law of motor carrier regulation, appellants suggest the appeal merits acceptance by this Court.

Not *Boston & Maine R. Co.* v. *United States*, 358 U. S. 68, but *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498, provides the guiding authority. *Boston & Maine* concerned a narrow jurisdictional issue that was found prematurely presented for decision. The appeal was dismissed without prejudice. *Southern Pacific Terminal* recognized that urgent questions involved in reviewing orders of the Commission ought not to be precluded by allegations of mootness.

Appellants respectfully suggest that the questions presented on this appeal are substantial and warrant plenary review.

Respectfully submitted,

ARTHUR A. ARSHAM,
233 Broadway,
New York, N. Y. 10007.

JOHN J. C. MARTIN,
685 Third Avenue,
New York, N. Y. 10017,

Attorneys for Appellants.

EDWIN L. SPANGLER, JR.,
MAX L. WYMORE,
1700 Broadway,
Denver, Colorado 80203.

TILLY & GRAVES
830 Capitol Life Center,
Denver, Colorado 80203,
Of Counsel.

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